

1-1-2004

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## Recommended Citation

Christopher C. Lund, "Of Government Funding, Religious Institutions, and Neutrality: Seeing the Charitable-Choice Debate through the Lens of Arrow's Impossibility Theorem," *Tulsa Law Review* 40, no. 2 (Winter 2004): 321-342  
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# OF GOVERNMENT FUNDING, RELIGIOUS INSTITUTIONS, AND NEUTRALITY: SEEING THE CHARITABLE-CHOICE DEBATE THROUGH THE LENS OF ARROW'S IMPOSSIBILITY THEOREM

Christopher C. Lund\*

The Supreme Court's decision last term in *Locke v. Davey*<sup>1</sup> was but another step in the continuing debate over the role religious institutions will play in the provision of government services. At the heart of that debate is "charitable choice," a legislative program that began in 1996, which gave religious groups equal access to federal funds for them to run religiously based social-service programs.<sup>2</sup> The Supreme Court's decision in *Davey* (like its earlier decision in *Zelman v. Simmons-Harris*<sup>3</sup>) bears upon, but does not determine, how that debate will be resolved.

The debate over charitable choice is, of course, part of a longstanding disagreement over whether religious institutions should receive government funds and, if so, to what extent. Variants of this question have been the subject of over fifty years of Supreme Court jurisprudence from *Everson v. Board of Education*<sup>4</sup> through *Zelman* and *Davey*. One side of the argument, usually denominated the "separationist" side, has generally fought to limit government funding of religious institutions; the other, often denominated the "neutralist" side, has generally fought to expand it.<sup>5</sup>

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\* Visiting Assistant Professor, University of Houston Law Center. I would like to thank Kerry Kornblatt, Leslie Griffin, Elisabeth Long, Lawrence Sager, and Douglas Laycock for their helpful comments on this piece. I also would like to thank the editorial staff of the *Tulsa Law Review* for their fine editing efforts and scheduling flexibility.

1. 540 U.S. 712 (2004).

2. Pub. L. No. 104-193, § 104, 110 Stat. 2105, 2161-63 (1996) (codified at 42 U.S.C. § 604a (West Supp. 2000)).

3. 536 U.S. 639 (2002).

4. 330 U.S. 1 (1947).

5. So acute are the disagreements between the two sides that even the labels used to describe them are not widely agreed upon. Some would argue that the side denominated "separationist" is not worthy of the label because they believe the position most consistent with separationism is a position that includes religious institutions along with secular organizations in government-funding programs. See Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.J. 43 (1997) [hereinafter Laycock, *Underlying Unity*]. Similarly, one could point out that the "neutrality" label might be misleading in the sense that many of those arguing for the funding of religious institutions are clearly not neutralists; instead, they believe that religious institutions should be given priority to government funds over nonreligious groups. See Douglas Laycock, "Nonpreferential" Aid to Religion:

Over the last fifteen years, the Supreme Court has relaxed the constraints of the Establishment Clause and has begun permitting the governmental funding of religious institutions. As Congress has begun to exercise its newfound authority, another question has arisen. This is the question of regulation. While secular private institutions providing government services are often regulated with a very heavy hand, religious institutions have, both by statutory provisions and constitutional norms, been exempt from much of that regulation. As the government's utilization of religious institutions to deliver social services has moved from constitutional impossibility to reality, the question of whether religious institutions should keep their relatively unregulated status has been a persistently contested question.

These regulatory questions are difficult in their own right. But what has made the situation even more complex is the fact that these regulatory questions have fed back into the funding question—the issue of how religious institutions will be regulated now enters into the question of whether or not they should be funded at all. The ancient, but simple, two-way disputes between neutralists and separationists over funding are over. The modern charitable-choice debates involve three sides, those who would support the funding of religious institutions without regulation, those who would support the funding with regulation, and those who would oppose funding altogether.

The fact that there are now three positions on charitable choice raises an interesting thought. Several centuries ago, the mathematician Marquis de Condorcet demonstrated the special problems that can arise when voters have more than two options on any particular issue. Condorcet called this the Voter's Paradox; Kenneth Arrow formalized it nearly fifty years ago as Arrow's Impossibility Theorem. The shared insight underlying their work is that a group of individuals can only be counted on to reach a stable consensus when it is given pairwise choices; when a group has more than two alternatives to choose from, the complexity of its collective preferences can send it into circles, unable to reach any resolution at all. The democratic process, in these circumstances, essentially breaks down.

The aim of this short symposium piece is to explain how the charitable-choice debate is looking increasingly like a Voter's Paradox. This essay traces our Voter's Paradox to its origin—our multifaceted, but inevitably contradictory, notions of neutrality. And it follows the Paradox out to a number of possible resolutions, including the rise of what Arrow would call "strategic voting" and "agenda setting." Ultimately, this piece seeks both to further the debate on charitable choice through the use of Arrow's conceptual apparatus, as well as to provide Arrow's followers with a real-world sighting of the implications of his work.

I. THE DECISION IN *LOCKE V. DAVEY* AND CHARITABLE CHOICE

At issue in *Davey* was whether the State of Washington, having chosen to create a broad scholarship program for low-income students attending college, could constitutionally choose to exclude those students who would use the funds to pursue a degree in devotional theology.<sup>6</sup> This issue was, in one sense, the conceptual flipside of the one the Supreme Court faced in *Zelman v. Simmons-Harris*. In *Zelman*, the Supreme Court held that the inclusion of religious groups in a voucher program did not violate the Establishment Clause.<sup>7</sup> In *Davey*, the issue was whether the exclusion of religious groups from a voucher program would violate the Free Exercise Clause.<sup>8</sup> In other words, while *Zelman* posed the question of whether the state *could* fund religious education, *Davey* asked whether, having created a generally applicable funding program, the state *had* to do so.

In an opinion that was quite terse, almost unanimous, and released significantly before the end of the term, the Court held that Washington retained the discretion to include or exclude theology students from its funding program. Recognizing that *Davey* was faced with “neither criminal nor civil sanctions”<sup>9</sup> imposed on his religious exercise, and noting Washington’s “historic and substantial”<sup>10</sup>—rather than animus-based—reasons for excluding theology students, the Court turned away *Davey*’s claim.<sup>11</sup>

*Davey* relates to charitable choice only tangentially. The *Davey* Court noted that there was no dispute that Washington could have chosen to include religious groups in its funding program, if it had so desired.<sup>12</sup> By explicitly reaffirming this principle, the Court again indicated its potential receptiveness to government-funding programs that include religious providers along neutral criteria—such as charitable choice.<sup>13</sup>

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6. 540 U.S. at 715.

7. 536 U.S. at 644.

8. 540 U.S. at 719.

9. *Id.* at 720.

10. *Id.* at 725.

11. For a comprehensive overview and systematic critique of the Court’s reasoning, see Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 Harv. L. Rev. 155, 171-200 (2004).

12. *Davey*, 540 U.S. at 719 (“As such, there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology, and the State does not contend otherwise.”). One striking thing about the *Davey* opinion is that even the four *Zelman* dissenters signed on to this statement. See The Pew Forum on Relig. & Pub. Life, *Speech, Anthony Picarello, Pres. & Gen. Counsel, Discussion: Locke v. Davey and Beyond*, <http://pewforum.org/events/index.php?EventID=52> (Feb. 1, 2005).

13. See The Becket Fund for Relig. Liberty, *Remark, Kevin J. Hasson, Pres., Supreme Court Decision in Locke v. Davey Is Good News in Battle Against Blaine Amendments*, <http://becketfund.org/index.php/article/249.html> (Feb. 25, 2004) (noting that the passage quoted in note 12 “[c]learly . . . bodes well for religious groups participating in charitable choice programs”).

Although *Davey*’s language suggested, implicitly, that the Court would be receptive to initiatives like charitable choice, the program at issue in *Davey* was the same sort of voucher program as the one at issue in *Zelman*. For that reason, the *Davey* court did not have occasion to address whether there is any constitutional difference between indirectly funded voucher programs and directly funded programs (such as charitable choice). Whether this difference is or should be constitutionally

Of course, if the Court had decided the case in Davey's favor, the implication would have been that charitable choice's inclusion of religious providers was not only constitutionally permissible, but perhaps actually constitutionally required. During oral argument, the Court seemed quite concerned that siding with Davey would commit the Court to the task of integrating religious institutions into all sorts of government-benefit programs.<sup>14</sup> The far-reaching implications of such a decision may be the best explanation for the Court's aloof reaction to Davey's claim.

## II. THE FUNDING DEBATE AND THE ADVENT OF CHARITABLE CHOICE

At least since the Supreme Court's decision in *Everson v. Board of Education*,<sup>15</sup> there has been a perpetual clash between two strains of Establishment Clause thought—a clash that is easily detectable within, but certainly antecedent to, the charitable-choice debates. This clash is between those who believe that religious organizations should be as entitled as secular organizations to government funds spent on public purposes and those that do not.<sup>16</sup> Both these groups can trace their positions back at least to the Supreme Court's decision in *Everson*. There, the Supreme Court faced the question of whether to permit New Jersey to fund bus transportation for private school students—a group that included students attending both secular and religious schools.<sup>17</sup> Although the Supreme Court ultimately struck down the aid as a violation of the Establishment Clause, it seemed to adopt the rationales of both the no-aid and nondiscrimination positions in its opinion.<sup>18</sup>

The conflict between these two visions of the Establishment Clause continues to this day. While the no-aid position seemed dominant for decades, a recent string of Supreme Court decisions has significantly, if not completely,

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significant is a question that has been significantly debated and remains fiercely contested. See *infra* nn. 20-21 (discussing the two positions on this issue).

14. During oral argument, Justice Breyer voiced these concerns to Solicitor General Olson, who was supporting Davey as *amicus curiae*:

[T]he implications of this case are breathtaking, that it would mean if your side wins, that every program, not just educational programs, but nursing programs, hospital programs, social welfare programs, contracting programs throughout the governments . . . there'd be a claim in each instance that they cannot be purely secular, that they must fund all religions who want to do the same thing, and that those religions, by the way, though it may be an excellent principle, may get into fights with each other about billions and billions of dollars. . . . So, I'd like you to address that.

Oral Argument at 51-52, *Davey*, 540 U.S. 712.

15. 330 U.S. 1.

16. Commentators have labeled the two sides of this debate in varying ways. See Carl E. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 Emory L.J. 1, 4 (1997) (using the labels of "separationism" and "neutrality"); Laycock, *Underlying Unity*, *supra* n. 5, at 46-48 (using the labels of "no-aid" and "nondiscrimination theory"); David Saperstein, *Public Accountability and Faith-Based Organizations: A Problem Best Avoided*, 116 Harv. L. Rev. 1353, 1385 (2003) (using the labels of "functional" and "facial neutrality").

17. 330 U.S. at 15-16.

18. See Laycock, *Underlying Unity*, *supra* n. 5, at 53 ("[T]he essence of both the no-aid and the nondiscrimination theories is succinctly laid out in two paragraphs of the Court's opinion in *Everson*.").

undercut it in favor of a general nondiscrimination principle.<sup>19</sup> Nevertheless, the logical extensions of that principle have not been completely adopted by the Supreme Court; the Court's decision in *Davey*, for example, suggests that the nondiscrimination position is legislative prerogative rather than constitutional command. Moreover, as separationists have argued, the Supreme Court has still not approved the direct funding of religious institutions, even as part of a facially neutral legislative program.<sup>20</sup> While the distinction between direct and indirect funding seems facile to some,<sup>21</sup> there is still one strong constitutional arrow in the quiver of those that oppose governmental funding of religious institutions.

One such direct-funding program—indeed, the most important direct-funding program—is the program commonly known as “charitable choice.” Charitable choice began in 1996 with the passage of the Personal Responsibility and Work Opportunity Reconciliation Act.<sup>22</sup> That act requires government agencies to allow religious institutions to participate in funding opportunities on an equal basis with nonreligious organizations.<sup>23</sup> Charitable-choice provisions have spread and they now apply, as others have noted, to many federal programs, including: Temporary Aid to Needy Families, Welfare-to-Work, Community Services Block Grants, Substance Abuse and Treatment Block Grants, and

19. See e.g. *Zelman*, 536 U.S. 639; *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rectors & Visitors of the U. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

20. As Professor David Saperstein forcefully argues:

With all of the changes from the Supreme Court in the church-state arena, there is one central principle that must be kept in mind: the Supreme Court has never approved direct government cash support for pervasively sectarian institutions. Indeed, in cases in which the Supreme Court and other courts have upheld some type of government support for such religious institutions, they have gone out of their way to distinguish it from exactly the kind of direct government subsidies of houses of worship, religious ministries, and parochial schools that charitable choice entails . . . .

*Supra* n. 16, at 1378. Saperstein's point is a strong one, but it perhaps ignores the fact that the Court's incremental movements from strict separationism to neutrality have always come with reservations—reservations that are often just ignored in later cases. Compare e.g. *Mitchell*, 530 U.S. at 840 (O'Connor, J., concurring) (upholding aid to religious schools, but stressing that aid that could be diverted to religious purposes, which would include vouchers, would likely be unconstitutional), with *Zelman*, 536 U.S. at 672 (O'Connor, J., concurring) (upholding aid to religious schools in the form of vouchers).

21. “There are no good constitutional reasons why the neutrality principle the Supreme Court has developed to deal with questions of indirect funding should not also be applied to questions of direct funding. The distinction is one of form, not substance.” Stephen V. Monsma, *The “Pervasively Sectarian” Standard in Theory and Practice*, 13 Notre Dame J.L. Ethics & Pub. Policy 321, 338 (1999).

22. Pub. L. No. 104-193, § 104, 110 Stat. 2105, 2161-63 (1996) (codified at 42 U.S.C. § 604a (2000)).

23. Of course, even before 1996, faith-based organizations played an important role in the delivery of social services. See generally Stephen V. Monsma, *When Sacred and Secular Mix: Religious Nonprofit Organizations and Public Money* (Rowman & Littlefield 1996). Before that point, however, religious institutions could not directly enter into partnerships with the federal government; they instead had to create secular nonprofit corporations to do so. While that may seem like a minor requirement, charitable choice allows religious organizations to apply for and receive government funds while keeping their religiosity undiluted. See 42 U.S.C. § 604a(b) (explaining that the current setup permits “religious organizations to accept certificates, vouchers, or other forms of disbursement . . . on the same basis as any other nongovernmental provider without impairing the religious character of such organizations”).

Projects for Assistance in Transition from Homelessness.<sup>24</sup> There have been some attempts to expand charitable choice far beyond these boundaries, but they generally have not succeeded.<sup>25</sup>

Charitable choice remains quite controversial and debates surrounding its wisdom and constitutionality remain—just as the fights over the indirect funding of religious schools existed both before and after the Court's decision in *Zelman*. Proponents and opponents argue over many things. They disagree as to whether religious providers will be better or worse at providing services of secular value. They disagree as to whether religious institutions themselves would be better served by being denied or by refusing government funds. Perhaps most importantly, they disagree on charitable choice's constitutionality. Proponents of charitable choice argue that failing to fund religious groups violates the Constitution's promise of equality. Opponents argue that funding religious groups violates the Constitution's promise of a secular government. And some in the middle, finding both of these constitutional arguments unpersuasive, see the issue as one the Constitution does not decide.

### III. THE INTRODUCTION OF THE REGULATION QUESTION: FROM TWO POSITIONS TO THREE

This debate—the debate over the funding of religious institutions—is one that still rages, and the two positions associated with it remain diametrically opposed to one another. But an interesting development has occurred. As charitable choice has grown, the question of how religious institutions that receive government funds will be regulated (which was formerly purely conjectural) now has real importance.

The question of regulation arises because religious entities are endowed with special rights to avoid regulation. Perhaps unlike secular groups, they have an apparently constitutional right to choose their leaders.<sup>26</sup> They also receive a number of statutory exemptions—they need not even file applications for tax-exempt status, cannot be brought into tort or contractual liability on issues of their religious conduct, and receive a number of other statutory exemptions.<sup>27</sup> The

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24. See Ira C. Lupu & Robert W. Tuttle, *Government Relationships with Faith-Based Providers: The State of the Law* 4, [http://www.religionandsocialpolicy.org/docs/legal/reports/10-23-2002\\_state\\_of\\_the\\_law.pdf](http://www.religionandsocialpolicy.org/docs/legal/reports/10-23-2002_state_of_the_law.pdf) (accessed Jan. 6, 2005). President Bush has further developed charitable choice through the issuance of several executive orders. See Exec. Or. 13279, 3 C.F.R. 258 (2002); Exec. Or. 13199, 3 C.F.R. 752 (2001); Exec. Or. 13198, 3 C.F.R. 750 (2001).

25. For a comprehensive legislative history of subsequent bills intended to expand charitable choice, see Robert W. Carter, Jr., Student Author, *Faith-Based Initiatives: Expanding Government Collaboration with Faith-Based Social Service Providers*, 27 Seton Hall Legis. J. 305 (2003).

26. See Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 Vill. L. Rev. 37, 72-74 (2002). One might question whether that constitutional right remains particular to religious groups after the Supreme Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), which seems to give a similar right to all organizations, regardless of their religious or secular nature. See Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 Loy. U. Chi. L.J. 71, 85-91 (2001).

27. See Saperstein, *supra* n. 16, at 1387.

statutes implementing charitable choice go to lengths to preserve these sorts of exemptions.<sup>28</sup>

The most important regulatory issue, however, is the issue of religious discrimination. Religious groups are, by statute, exempt from some of the nondiscrimination requirements imposed on secular corporations by Title VII. While Title VII generally forbids employment discrimination on the basis of religion, race, sex, and national origin, a special section of the Act lifts the ban on religious discrimination for religious entities.<sup>29</sup>

This exemption is largely seen as crucial by religious organizations.<sup>30</sup> For that reason, the question of whether religious organizations will be able to preserve that exemption when government funding is involved has become a crucial element in the charitable-choice debate.<sup>31</sup> It is controversy over this issue that seems to have prevented proponents from being able to expand charitable choice to federal grant programs more generally.<sup>32</sup> Some argue that the regulation of religious providers of government services is a concern of the first order or even constitutionally required.<sup>33</sup> Alternatively, many believe that the regulation of religious providers is unwise or even constitutionally forbidden.<sup>34</sup>

The introduction of questions of regulation has changed the tone of the charitable-choice debate. The questions of funding and regulation—once

28. The charitable-choice provision explicitly protects the right of religious organizations to maintain their form of internal governance, retain their independence from federal, state and local governments, and to keep up religious iconography on their property. 42 U.S.C. § 604(d).

29. 42 U.S.C. § 2000e-1(a) (2000). The constitutionality of this exemption was upheld unanimously in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

30. See e.g. Carl H. Esbeck, Stanley W. Carlson-Thies & Ronald J. Sider, *The Freedom of Faith-Based Organizations to Staff on a Religious Basis* (Ctr. for Pub. Just. 2004); Paul Taylor, *The Costs of Denying Religious Organizations the Right to Staff on a Religious Basis When They Join Federal Social Service Efforts*, 12 Geo. Mason U. Civ. Rights L.J. 159 (2002). As will be discussed later, the right to discriminate on the basis of religion is of such importance to religious organizations that even some supporters of charitable choice would not back it without the right being maintained. See *infra* n. 73.

31. See Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values*, 30 Hastings Const. L.Q. 1, 7 (2003) (“The religious discrimination issue has risen to the forefront of the Charitable Choice debate . . . .”); Elbert Lin, Jon D. Michaels, Rajesh Nayak, Katherine Tang Newberger, Nikhil Shanbhag & Jake Sullivan, *Faith in the Courts? The Legal and Political Future of Federally-Funded Faith-Based Initiatives*, 20 Yale L. & Policy Rev. 183, 224 (2002) (“[P]ublic opposition to and political debate regarding faith-based initiatives may center on issues of discrimination, as we believe it will in the legal realm.”).

32. See Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 Notre Dame L. Rev. 917, 993 n. 325 (2003) (explaining how “battles over the scope of employment discrimination laws as applied to faith-based providers have been a central impediment to current legislative proposals to expand charitable choice”).

33. See *infra* nn. 41-42. The constitutional arguments can take two forms. The first argument is that the receipt of government funds renders religious institutions governmental actors for constitutional purposes, so that they are bound by the Constitution's prohibition on religious discrimination. The second argument is that exempting religious, but not secular, organizations from Title VII's prohibition on religious discrimination is an unconstitutional endorsement of religion. These arguments are usually raised in tandem. See Alex J. Luchenitser, *Casting Aside the Constitution: The Trend Toward Government Funding of Religious Social Service Providers*, 35 Clearinghouse Rev. 615, 617-27 (2002); Laura B. Muttperl, Student Author, *Employment at (God's) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation*, 37 Harv. Civ. Rights-Civ. Libs. L. Rev. 389, 426-43 (2002); Green, *supra* n. 31, at 44-55.

34. See *infra* n. 45.



conceptually separate—have become conflated. The orderly, if not necessarily civil, debate between separationists and neutralists has become something far more complex, as there are now three positions that can be taken in the charitable-choice debate. One can oppose funding altogether, one can support funding but insist that religious groups give up their regulatory exemptions (including, most prominently, the right to discriminate), or one can support funding and allow religious groups to retain their deregulated status. Consider these the no-funding position, the regulated-funding position, and the deregulated-funding position, respectively.

For separationists, the introduction of the regulation question has not influenced their position on funding. For them, the regulation question has remained distinct from the funding question. They, therefore, have a relatively easy time adjusting to the new situation.

But the same cannot be said for the neutrality camp. For them, the question of regulation has fed back into the question of funding with dire consequences. The specter of regulation has in many ways broken apart the easy conception of neutrality that had earlier existed. For before the question of regulation arose, every conception of neutrality pointed toward the equal funding of religious institutions. Formal neutrality suggested that the government should treat religious and secular organizations alike, and thus favored extending funds to religious nonprofit organizations on the same terms as secular nonprofit organizations.<sup>35</sup> Substantive neutrality reinforced that conclusion by stressing that denying religious organizations funding would pressure them to secularize.<sup>36</sup> There were arguments that the funding of religious institutions generally violated neutrality principles.<sup>37</sup> But those arguments did not seem to have widespread

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35. See Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. Chi. L. Rev. 1, 96 (1961) (framing the notion of formal neutrality as the requirement “that government cannot utilize religion as a standard for action or inaction because [the Constitution] prohibit[s] classification in terms of religion either to confer a benefit or to impose a burden”).

36. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001 (1990) (defining substantive neutrality as requiring “government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance”).

37. Professor Brownstein endorsed this view, stressing that charitable choice is not neutral in that the vast amount of government funds will inure to the benefit of dominant, rather than minority, religious groups. See e.g. Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of “Neutrality Theory” and Charitable Choice*, 13 Notre Dame J.L. Ethics & Pub. Policy 243, 246-56 (1999). See also Susanna Dokupil, *A Sunny Dome with Caves of Ice: The Illusion of Charitable Choice*, 5 Tex. Rev. L. & Pol. 149, 198 (2000) (making a similar argument). Brownstein also made a more nuanced neutrality argument when he explained how charitable choice, as a program that was formally neutral, might not be substantively neutral. A Jewish social-service program religiously obligated to close on Saturday, faced with the loss of government funds for doing so, might choose to depart from its religious commitments for government funds. Brownstein, *supra*, at 251. Such covert government influence over religious choices would be a classic violation of substantive neutrality.

Brownstein's example reflects an important concern. But the conclusion he draws seems incorrect. If we are concerned primarily about pressure being placed on the Jewish organization to change its religious commitments, it would be best to have constraints on the government's ability to attach these sorts of operating conditions. Brownstein's solution—preventing religious organizations from receiving funding—only changes the form of the pressure. For instead of being pressured to abandon its commitments to the Sabbath by the lure of government funds, the Jewish group now will

influence and were soundly rejected by the conception of neutrality the Supreme Court adopted in *Zelman*.<sup>38</sup>

But the introduction of the regulation question has destroyed the consensus on what neutrality requires. Consider the following religious neutrality concerns:

*Neutrality Concern A:* "Neutrality" requires that religious groups be funded on the same basis as secular groups.<sup>39</sup>

*Neutrality Concern B:* "Neutrality" requires that religious groups have the ability to resist regulation in order to maintain their identity, most importantly by maintaining the right to discriminate among employees on the basis of religion.<sup>40</sup>

*Neutrality Concern C:* "Neutrality" requires that employees of government-funded jobs not face discrimination because of their religious beliefs.<sup>41</sup>

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be pressured to make even larger changes (i.e., to completely secularize its program). Perhaps religious organizations will feel more pressure to change for government monies when the requested change is minor rather than comprehensive. But, in any event, a better solution suggests itself—having the government take special precautions to insure that minority religious organizations receiving government funds can still maintain their diverse religious commitments.

38. The *Zelman* court, by rejecting the conclusion that a voucher program was unconstitutional simply because the vast majority of the funds ended up going to religious private schools, seems to have dispatched this neutrality argument—or at least stripped it of its constitutional status. 536 U.S. at 651-53.

39. See e.g. Laycock, *Underlying Unity*, *supra* n. 5, at 48 (explaining that "any discrimination against religion is a departure from neutrality" and that neutrality demands that "a government that pays for medical care should pay equally whether the care is provided in a religious or a secular hospital"); Esbeck, *supra* n. 16, at 20-21 ("Neutrality theory [requires that] when government provides benefits to enable activities that serve the public good, such as education, health care, or social services, there should be [no] discrimination in eligibility based on religion.").

40. See e.g. Charles L. Glenn, *The Ambiguous Embrace: Government and Faith-Based Schools and Social Agencies* 101 (Princeton U. Press 2000) (arguing that neutrality requires not only "that faith-based organizations be eligible for funding" but also that they be "protected from interference with how they approach the work for which they are funded"); Stephen V. Monsma, *Positive Neutrality: Letting Religious Freedom Ring* 188-209 (Greenwood Press 1993) (arguing that neutrality, conceptualized as "positive neutrality," requires that religious organizations remain generally free from the regulations imposed on secular organizations); Esbeck, *supra* n. 16, at 26 (arguing that "exemptions from regulatory burdens" for religious institutions is the only way to be "neutral" with respect to the "impact of governmental action on personal religious choices").

41. See Green, *supra* n. 33, at 50 ("Few results could be further from the principle of neutrality that prohibits government from affecting the religious choices of individuals" than "[a]llowing religious organizations to discriminate in publicly funded positions."); Mutterperl, *supra* n. 31, at 437 (explaining that allowing religious discrimination within religious institutions "is not neutral" because it both "favors the selected organization's coreligionists" and deprives non-coreligionists "of the ability to compete equally for federally funded jobs").

*Neutrality Concern D:* "Neutrality" requires that the government regulate the use of its funds in the same manner regardless of whether the receiving institution is religious or secular.<sup>42</sup>

All four of these neutrality concerns are logically derivative from principles of formal and substantive neutrality.<sup>43</sup> Each of them also has some constitutional pedigree. Concern A had been pushed for years as a constitutional requirement of the Free Speech and Free Exercise Clauses.<sup>44</sup> Although courts have not addressed the issue, commentators have suggested that the Free Exercise Clause or the unconstitutional-conditions doctrine may require Concern B as a special protection for religious groups participating in governmental programs.<sup>45</sup> Concern C has now, in several articles, been forcefully pushed as a requirement of either

42. See Steven K. Green, *The Ambiguity of Neutrality*, 86 Cornell L. Rev. 692, 711 (2001) (arguing that neutrality not only does not justify "protecting the religious identity of religious providers and exempting them from Title VII," but also requires that religious organizations be subject to "laws of general applicability, even if their application has a disproportionate impact on religious practice"); Mutterperl, *supra* n. 33, at 432, 434 (arguing that neutrality "fails to sustain the constitutionality of [any regulatory] exemption" because the "financial subsidies in charitable choice transform the relationship between the government and private entity" so that "[a]ny accommodation [from regulatory requirements] granted to religious entities and denied to secular entities constitutes establishment").

43. There are other possible neutrality considerations. One is the concern that beneficiaries of charitable-choice programs will not be able to find a secular provider and will be effectively coerced into participating in religious programs with which they disagree. This neutrality concern, however, is widely recognized and accepted by all parties in the charitable-choice debate. See H.R. Subcomm. On the Const. of the Jud. Comm., *Hearing on the Constitutional Role of Faith-Based Organizations in Competitions for Federal Social Service Funds*, 107th Cong. 71 (June 7, 2001) [hereinafter *Hearing on the Constitutional Role of Faith-Based Organizations*] (statement of Ira C. Lupu, L. Prof., Geo. Wash. Sch. of L.) ("Proponents and opponents of [charitable-choice] legislation concur that beneficiaries should never be forced to accept religiously influenced social services, or be forced to accept any such services in a religious setting.").

Federal law accordingly forbids religious organizations from conditioning services upon a beneficiary's religious participation and guarantees beneficiaries the right to receive services from an alternative, secular provider. See 42 U.S.C. § 604a(e)(1), (g). Whether this statute will protect beneficiaries in practice may be a separate question. *Hearing on the Constitutional Role of Faith-Based Organizations*, *supra*, at 50-51 (statement of Douglas Laycock, Alice McKean Young Regents Chair in L., U. Tx. Sch. of L.) (articulating concerns as to whether these sorts of safeguards will, in practice, be meaningful).

44. See *supra* n. 39 (giving constitutional arguments in favor of this neutrality concern). This concern was adopted as a requirement of the Free Speech Clause in *Rosenberger*, 515 U.S. 819, which incorporated that notion of neutrality into the concept of viewpoint discrimination. But the Supreme Court's decision in *Davey* makes clear that it is not a general command of the Free Exercise Clause. See *supra* nn. 5-14 and accompanying text.

45. See *Hearing on the Constitutional Role of Faith-Based Organizations*, *supra* n. 43, at 88 (testimony of Douglas Laycock, Alice McKean Young Regents Chair in L., U. Tx. Sch. of L.) ("I think if we had a court that cared about free exercise, that would be an unconstitutional condition. The government should not say to religious organizations, if you get rid of enough of that religious stuff we will give you some money."); Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. Cin. L. Rev. 151, 218-19 (2003) (noting that "the Constitution still guarantees some special freedoms for religious institutions even after *Employment Division v. Smith*, including the right to hire and fire clergy [funded by government programs] and the broader right of church autonomy"). But see Lupu & Tuttle, *supra* n. 32, at 976 (arguing that a church's autonomy concerns will diminish significantly when a government entity is funding the program at issue); Marc D. Stern, *School Vouchers—The Church-State Debate That Really Isn't*, 31 Conn. L. Rev. 977, 991 (1999) (suggesting, at least in the school voucher context, that it is "unlikely that [such antidiscrimination strings] could be challenged as an unconstitutional condition on the grant of government funds").

the Establishment or Equal Protection Clause, although few court cases address it.<sup>46</sup> Concern D was perhaps forcefully rejected by the Supreme Court in *Corporation of the Presiding Bishop v. Amos*,<sup>47</sup> but that rejection was made without consideration of issues of government funding. Those supporting Concern D as a constitutional matter suggest that, in the context of charitable choice, the Constitution requires a different outcome.<sup>48</sup>

This creates a problem for the committed neutralist, for the four neutrality concerns above are irreconcilable with each other. It is simply not possible to create a position on the funding and regulation questions that can satisfy all four. Each position is consistent with some, but only some, of them:

- Position 1:*       The No-Funding Position  
This position is consistent with concerns B, C, and D.
- Position 2:*       The Deregulated-Funding Position  
This position is consistent with concerns A and B.
- Position 3:*       The Regulated-Funding Position  
This position is consistent with concerns A, C, and D.

Note that no position has a set of neutrality concerns that completely contains another position's set of neutrality concerns. To put the point more strongly, any argument that any of these three positions is any "more neutral" than another must be based on some prior commitment to the value of some neutrality concerns over others. Without such a commitment, it cannot be said that any one position is more neutral than any other. This, of course, is somewhat dismaying. Neutrality here pushes toward no less than three ideas of the role religious institutions should play in our society. Commentators have often seen neutrality as a word that is ultimately meaningless. Although this claim can often be overstated, it is impossible to deny its force here.<sup>49</sup>

46. See *supra* n. 41 (giving constitutional arguments in favor of this neutrality concern).

47. 483 U.S. 327 (1987).

48. See *supra* n. 42 (giving constitutional arguments in favor of this neutrality concern).

49. Despite the fact that neutrality does push in many directions, some commentators perhaps go too far in suggesting it has no conceptual value. Professor Frank Ravitch, for example, recently remarked, "Like the tooth fairy, neutrality is just a myth, but like children who want the tooth fairy to visit, we want neutrality to be real or at least for something to stand in for it to make us believe it is real." *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 Ga. L. Rev. 489, 504 (2004). See generally Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (Oxford U. Press 1995) (arguing that neutrality is an essentially illusory concept).

It is no doubt true that neutrality is often used opportunistically, and might have (as we have seen) seemingly contradictory dictates in any particular situation. Yet it seems strange to conclude that neutrality has no meaning by means of an argument that suggests that neutrality has *too many* meanings. Douglas Laycock makes essentially the same point regarding the phrase "separation of church and state" in his review of Philip Hamburger's important book of the same title. See Douglas Laycock, *The Many Meanings of Separation*, 70 U. Chi. L. Rev. 1667 (2003).

One other point should be made. Earlier, we noted that before the question of regulation entered the picture, conceptions of neutrality—every conception of neutrality—lay in support of the funding of religious institutions. But now one can reach the no-funding position purely out of respect for neutrality principles; a firm commitment against government-funded religious discrimination and a deep fear of religious institutions being regulated and losing their rights to preserve their identity reaches that result.<sup>50</sup>

#### IV. THE VOTER'S PARADOX, ARROW'S IMPOSSIBILITY THEOREM, AND THE CHARITABLE-CHOICE DEBATE

The introduction of the regulation question, as we have seen, has radically changed the charitable-choice debate. The debate cannot now be reduced to a string of pairwise questions regarding funding and regulation. The debate does not now proceed by asking, "Should religious groups be funded? If so, how should they be regulated?" Instead, the questions of funding and regulation have been conflated into a single question that produces three possible answers. Each of these answers has such disparate strengths and weakness that is impossible to arrange them all on some easy linear continuum. For that reason, the Voter's Paradox—and its more formalized cousin Arrow's Impossibility Theorem—applies directly to this situation. For when three or more political choices that cannot easily be arranged on a one-dimensional continuum exist, Arrow's Impossibility Theorem explains that a failure of pure representative democracy can occur. As is explained below, this is apparently what is currently happening in the charitable-choice debate.

##### A. *A Brief Introduction to the Voter's Paradox and Arrow's Impossibility Theorem*

The Voter's Paradox was developed by the Enlightenment mathematician Marquis de Condorcet—although its implications were not fully realized until the Paradox was rediscovered and refined by Kenneth Arrow.<sup>51</sup> At the heart of the Voter's Paradox is the insight that, in a system where voters are called upon to rank three or more options, majority decisionmaking can fail to yield a coherent result. A simple example of the Paradox's application illustrates its counterintuitive implications best. Assume that there are three voters (Voters 1, 2, and 3) in an election precinct and three candidates (Candidates A, B, and C) running for election. The ballot asks the voters to rank the candidates in order of their preferences. The result of the election comes back as follows:

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50. For a good example of a commentator apparently reaching this position principally through consideration of neutrality principles, see Saperstein, *supra* n. 16.

51. Although Condorcet played the major role in developing the Voter's Paradox, he perhaps would not have agreed with the uses to which later theorists have put his Paradox. See Cheryl D. Block, *Truth and Probability—Ironies in the Evolution of Social Choice Theory*, 76 Wash. U. L.Q. 975, 982-83 (1998) (observing that although "[o]ne might think . . . Condorcet himself would have been critical of democratic voting procedures. . . . Condorcet actually became a more ardent believer in democratic decision making in later writings").

	Ranking #1	Ranking #2	Ranking #3
Voter 1:	A	B	C
Voter 2:	B	C	A
Voter 3:	C	A	B

In this example, a majority of the voters, Voters 1 and 3, prefer A to B. A majority of the voters, Voters 1 and 2, prefer B to C. One would naturally think then that a majority of voters would surely prefer A to C. But this turns out not to be the case, as a majority of voters, Voters 2 and 3, actually prefer C to A. The crushing impact of the Voter's Paradox is this: No matter how this election is resolved, two-thirds of the voters in the district would have preferred some other candidate to the one actually elected. If, by hook or crook, some candidate were to be selected, there would be an immediate push for a recall election. In theory at least, the recall process would continue with no end, because for every candidate, there is another candidate that a majority of voters would rather have in office. The Voter's Paradox thus illustrates the problems that exist when voters are able to choose between more than two options that cannot be arranged on an easy linear continuum.<sup>52</sup> In such a situation, a democratic system may not be able to lead to a stable or "rational" outcome.<sup>53</sup> Without some radical change either in how the elections are conducted or how voters conduct themselves at the polls, the democratic process would cycle endlessly.

Arrow's Impossibility Theorem is essentially a formalization of that last sentence. Arrow discussed five basic conditions reflecting our common perceptions of how elections should be conducted and how voters should behave in a democratic system.<sup>54</sup> These conditions were rationality,<sup>55</sup> unanimity,<sup>56</sup>

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52. It is important to note that the Paradox above develops not merely because voters adopt each of the three positions as their first-place choices, but because their preferences are what we would call "multi-peaked." One article explains:

Preferences are single-peaked when all alternatives can be arrayed in a single dimension, such that each member's preference decreases in step with the distance of any alternative from her optimum. This may occur if voters identify an issue as located on a single ideological spectrum from Left to Right, and rank alternatives in direct proportion to their distance from the ideological point with which they identify.

Richard H. Pildes & Elizabeth S. Anderson, *Slingshot Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 Colum. L. Rev. 2121, 2135 n. 45. See also Block, *supra* n. 51, at 991 ("[D]espite the voting paradox, when individual preferences can be plotted along a single dimensional scale, majority rule does result in consistent and stable group choices." (emphasis omitted)).

This point will be made in more detail later, but it is precisely our multifarious notions of neutrality—and the fact that they cannot be aligned along a single dimension—that has caused preferences in the charitable-choice debate to be multi-peaked.

53. Arrow initially used the term "rationality" as a synonym for the requirement of transitivity. Kenneth J. Arrow, *Social Choice and Individual Values* 21 (2d ed., John Wiley & Sons 1963) (explaining "rationality" as the ability to maintain "a one-dimensional ordering of all possible alternatives"). Other terms, like "consistency," are also used to refer to this criterion. See Pildes & Anderson, *supra* n. 52, at 2131 n. 33.

54. See generally Kenneth J. Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. Political Econ. 328 (1950); Arrow, *supra* n. 53.

55. The criterion of rationality holds that if society prefers outcome A over outcome B and outcome B over outcome C, it should also prefer outcome A over outcome C. In defining the criterion

nondictatorship,<sup>57</sup> range,<sup>58</sup> and the independence of irrelevant alternatives.<sup>59</sup> Arrow then demonstrated that these five conditions were ultimately irreconcilable with each other: to adopt four inherently means that a society has to reject the fifth. Another equivalent way to state Arrow's conclusion is this: In a voting regime where the last four criteria are satisfied, there can be instances of cycling (i.e., failures to reach a "rational" outcome).<sup>60</sup> A voting system can ensure avoidance of cycling only by using a decisionmaking process that violates another of the conditions.

Commentators dramatically disagree on the implications Arrow's Theorem has for democratic decisionmaking. Some commentators go so far as to argue that the Theorem exposes democratic decisionmaking as wholly arbitrary.<sup>61</sup> Others would go less far and just say that Arrow's Theorem poses a serious difficulty for democracy.<sup>62</sup> Some are even less concerned.<sup>63</sup> But commentators of all political stripes have found use for Arrow's principle, using it to justify everything from broad delegations of legislative power to administrative agencies to the conclusion that a two-party political system is preferable to a multiple-party one.<sup>64</sup> And certainly no one disputes its almost icon-like status.<sup>65</sup>

of rationality and Arrow's other criteria, this article largely borrows from language used by Herbert Hovenkamp in his article, *Arrow's Theorem: Ordinalism and Republican Government*, 75 Iowa L. Rev. 949 (1990).

56. The unanimity requirement holds that "[i]f one person prefers outcome A over outcome B and all other people either agree with that person or are absolutely indifferent between A and B, then society prefers outcome A over outcome B." *Id.* at 950.

57. The nondictatorship axiom requires that no one individual have a position "such that if he prefers outcome A over outcome B, outcome A will be chosen, no matter what the preferences of others." *Id.*

58. The requirement of range imagines a process that considers "all relevant individual preferences, and not just some arbitrarily defined subset. For example, if possible choices include outcome A, outcome B, and outcome C, the process may not arbitrarily drop outcome C and force a decision between outcome A and outcome B." *Id.*

59. Finally, this criterion (the independence of irrelevant alternatives) requires that "[w]ith respect to any vote currently on the agenda—for example, as between outcome A and outcome B—how voters would rank a different outcome—for example, C—must be totally irrelevant to the particular vote at hand." *Id.*

60. Professor Hovenkamp notes the tendency of commentators to simply take the first four conditions as axioms, and just treat Arrow's Theorem as guaranteeing the possibility of cycling under those circumstances. See *supra* n. 55, at 951 ("Much of the literature relying on Arrow's theorem to critique the legislative process argues that the transitivity condition will fail—that is, there will be an endless cycle of votes and no natural end to the process."). In this way, Arrow's Theorem is effectively reduced to a complicated form of the Voter's Paradox. But Hovenkamp rightly points out a more obscure point about Arrow's Theorem, which is the cost that must be paid to prevent cycling—namely, the failure of one of the four other conditions. *Id.* at 951-52.

61. See William H. Riker, *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* 238 (W.H. Freeman & Co. 1982) ("The social amalgamations of individual values are, for reasons just summarized, often inadequate—indeed meaningless—interpretations of public opinion. . . . Clearly populism cannot survive.").

62. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 547-48 (1983) ("Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice.").

63. See Hovenkamp, *supra* n. 55, at 949 ("[L]egislative outcomes [still] can be said to reflect the welfare needs of constituents in a meaningful, although certainly not perfect, sense.").

64. See Pildes & Anderson, *supra* n. 52, at 2124-26.

65. *Id.* at 2124 (noting that the Theorem has been called "one of the most significant intellectual achievements of this century").

The more radical implications of Arrow's Theorem have often been avoided through assumptions that these sorts of situations rarely arise in the real world. Many of the examples used to explain the theorem are admittedly contrived or phrased in an exceedingly high level of generality.<sup>66</sup> Finding an actual example of these paradoxes in real life has been extraordinarily difficult.<sup>67</sup> One commentator has suggested that the Voter's Paradox is a modern day Loch Ness Monster.<sup>68</sup> Arrow's Theorem therefore has remained largely more theoretical than real, as there are very few, if any, examples of it actually occurring.

### B. *The Application of These Paradoxes to Charitable Choice*

While the examples usually invoked to explain the Voter's Paradox and Arrow's Impossibility Theorem are often abstract or wholly conjectural, the two principles can be applied to the debate surrounding charitable choice in a straightforward manner.

We have established that there exist communities that support each of the three possible positions on charitable choice. There are advocates, usually the original supporters of charitable choice, who adopt the deregulated-funding position.<sup>69</sup> There are also the traditional detractors of charitable choice who adopt the no-funding position.<sup>70</sup> Finally, there is a burgeoning group of commentators—

66. See e.g. Hovenkamp, *supra* n. 55, at 951-52 (giving the example of a hypothetical legislature that can fund one of only three possible options—crop subsidies, welfare payments, and national defense). In addition to this article, there are at least two other uses of religion-clause scenarios raising Voter's Paradox issues; both are mostly conjectural. In their work, Richard Pildes and Elizabeth Anderson invoke a situation where a town splits on whether to allow only crèche displays, allow displays of crèches and other religious and secular symbols, or forbid all displays. *Supra* n. 50, at 2163-64. Judge, then Professor, Easterbrook, once described a similar situation where three justices were committed to a rigorous separationism, while three justices were committed to neutrality theory, and three others were committed to balancing. *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802, 815-16 (1982).

67. See Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 Va. L. Rev. 423, 430 n. 25 (1988) (citing an unpublished study suggesting that, from 1919 to 1984, roll call voting in the United States Congress has exhibited single-peakedness on a one-dimensional political spectrum); Pildes & Anderson, *supra* n. 52, at 2140-41 (suggesting that "[t]he distribution of citizen or representative preferences over policies is usually not divergent enough—and thus social conflict is not complex enough—to produce inconsistent collective preferences").

Another piece reviewing the literature put it the following way:

[I]t is important to distinguish the theoretical analysis of when cycles can occur from the practical analysis of when cycles do occur. The latter type of research is difficult because information about the actual distribution. Unfortunately, even the largely theoretical literature with regard to the frequency of cycling is inconclusive.

Block, *supra* n. 51, at 989-90 (emphasis and footnotes omitted).

68. Bernard Grofman, *Public Choice, Civic Republicanism, and American Politics: Perspectives of a "Reasonable Choice" Modeler*, 71 Tex. L. Rev. 1541, 1553 (1993) ("Indeed, hunting for the [Voter's] paradox is much like hunting for the Loch Ness monster: appearances are few and far between, and some of the sightings are suspect").

69. These proponents would include commentators like Carl Esbeck and Douglas Laycock. See *supra* n. 39-40. It would also include the Coalition to Preserve Religious Freedom, a coalition of faith-based organizations that includes such groups as World Vision, the Christian Legal Society and the Center for Public Justice. See e.g. Council for Christian Colleges & Universities, *Coalition to Preserve Religious Freedom*, [http://www.cccu.org/services/services\\_detail.asp?serviceID=76&parentCatID=7](http://www.cccu.org/services/services_detail.asp?serviceID=76&parentCatID=7) (accessed Jan. 6, 2005).

70. This would include academic theorists like Alan Brownstein, Steven Green, and David Saperstein. See *supra* nn. 16, 37, 41-42. It would also include such diverse groups as Americans United



often somewhat ignored—that have come to adopt the regulated-funding position.<sup>71</sup>

But, as explained before, the problem is not merely that three groups have adopted varying positions with regard to charitable choice—the problem is that their preferences are multi-peaked.<sup>72</sup> Consider the following. Douglas Laycock prefers that religious groups be funded equally to secular groups, but insists that religious groups be deregulated. If such deregulation were impossible, he would prefer that funding not occur at all.<sup>73</sup> Steven Green believes that religious groups should not be funded, but believes that if they are funded, they must be regulated.<sup>74</sup> Lastly, Martha Minow would ideally fund religious groups, but would prefer that they be regulated.<sup>75</sup> Labels aside, the confluence of the preferences of

for Separation of Church and State, the Freedom from Religion Foundation, and the Baptist Joint Committee—as well as the member groups of the Coalition Against Religious Discrimination. See Am. Humanist Assoc., *The Coalition Against Religious Discrimination, Letter to President George W. Bush*, <http://www.americanhumanist.org/press/CoalAgRelDis.htm> (accessed Jan. 6, 2005) [hereinafter *Coalition Against Religious Discrimination Letter*].

71. Perhaps the most influential article taking this position is Martha Minow's piece, *Public and Private Partnerships: Accounting for the New Religion*, 116 Harv. L. Rev. 1229 (2003). There are apparently other advocates of this view as well. See e.g. Michele Estrin Gilman, "Charitable Choice" and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses, 55 Vand. L. Rev. 799 (2002).

72. See *supra* n. 52 (describing the requirement of multi-peakedness as a condition necessary for the Voter's Paradox to develop). It is important to stress that the breakdown of neutrality, described in Parts II and III of this paper, serves to explain the multi-peakedness of preferences in charitable choice. The many meanings of neutrality, which cannot be arranged on any one-dimensional continuum, have contributed to this problem.

73. In testimony given in support of charitable choice, Laycock argued that deregulation was an absolutely vital part of any charitable-choice program. He made it clear that he would prefer not to fund religious entities at all than fund them in a regulated manner:

Let me say just a little bit about this controversy over hiring. It is an essential part of deregulating the religious providers to the extent that very few of them refuse to hire any Member not of their own church, but many of them prefer Members of their own church—grant a preference. It is a serious intrusion into religious liberty to take that away.

It would be better to vote down charitable choice than to remove the deregulation of religious providers. From a religious liberty perspective, the worst outcome would be to codify a rule that government offers money to religious providers but only on condition that they agree to secularize themselves.

*Hearing on the Constitutional Role of Faith-Based Organizations*, *supra* n. 43, at 37, 49 (statement of Douglas Laycock).

74. Professor Green, a former legal director of Americans United for Separation of Church and State, lays out these points in his piece, *Charitable Choice and Neutrality Theory*, 57 N.Y.U. Annual Survey Am. L. 33 (2000). He there argues that charitable choice is unconstitutional principally because government "[f]unding an activity with the express purpose and goal of inculcating religious values and beliefs violates the core of the Establishment Clause prohibition." *Id.* at 47. Alternatively, however, he argues that allowing religious entities special rights to resist regulation—including the right to discriminate on the basis of religion—would also be unconstitutional. Providing "distinct advantages to religious entities that non-religious entities do not share," Green argues, "violates the Establishment Clause in a more subtle way." *Id.* at 44, 47.

75. Minow, in general, is a supporter of public-religious partnerships. Her article makes it clear, however, that she believes that religious organizations operating with government funds should be held accountable by the government for the use of those funds. She believes that, "like the state itself," religious entities that receive funds should "refrain from violating state and local antidiscrimination employment law and strive to ensure participants' freedom of religion and expression." *Supra* n. 71, at 1261.

these voters creates a table identical to the one initially demonstrating the Voter's Paradox:

	Ranking #1	Ranking #2	Ranking #3
Voter 1 (Laycock):	A	B	C
Voter 2 (Green):	B	C	A
Voter 3 (Minow):	C	A	B

A represents the deregulated-funding position.

B represents the no-funding position.

C represents the regulated-funding position.

As one can see, the votes here cycle in the same basic way as they did when the Voter's Paradox was first considered. Assuming the no-funding position as the status quo, Laycock and Minow—who both generally believe that religious groups should receive funding—would choose to fund religious providers and move to the deregulated-funding position. With that decision made, however, Minow and Green would recognize their common interest in ensuring the accountability of religious providers and would move to the regulated-funding position. At that point, Laycock's support for charitable choice would collapse and he and Green would both return the group to the no-funding position where they started. At that point, as Condorcet recognized long ago, the cycling would begin again.

The real world is no doubt more complicated than this example. The positions adopted by Laycock, Green, and Minow are not the only possible positions. Separationists who oppose charitable choice and greatly fear the regulation of religious entities may order the choices B-A-C.<sup>76</sup> Those who support charitable choice generally but will not fund religious entities if they are not

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It is not entirely clear, however, that Minow would rank her second and third-place alternatives in this way. This article assumes that she would prefer the deregulated-funding position over the no-funding position. As Professor Saperstein notes, Professor Minow does not explicitly say which is her least-preferred alternative:

Professor Minow believes that religious entities receiving government funds should not be allowed an exemption from the civil rights laws applicable to other entities. It is not clear, however, what Professor Minow would recommend if she lost the political battle on this issue and the religious exemption were applied to federally funded programs. Would she still argue that religious groups should receive government funding under such circumstances?

*Supra* n. 16, at 1389 (footnote omitted).

76. Professor and Rabbi David Saperstein appears to take this position in his piece. *See supra* n. 16. There, Professor Saperstein explains his opposition to charitable choice chiefly in terms of his grave concern about religious institutions being regulated. *Id.* at 1365-66 (arguing that "these [regulatory] exemptions that Professor Minow and others are now calling on religious institutions to give up in exchange for government contracts and funding . . . inherently threaten religious autonomy" and "may be irreconcilable with the concept of First Amendment rights"). "Threats to Religious Autonomy" is, in fact, the first category of reasons his paper gives to oppose charitable choice. *Id.* at 1365. If forced to accept the funding of religious institutions, his paper thus suggests that he would prefer the deregulated-funding position.

regulated could rank them C-B-A.<sup>77</sup> And lastly, proponents of charitable choice that would prefer religious groups to receive funding, even if it means giving up regulatory exemptions, could structure them A-C-B.<sup>78</sup> Nevertheless, the fact that voters may order the choices in other ways does not alleviate the Voter's Paradox. It only aggravates the problem.<sup>79</sup>

The problem, of course, is the failure of democratic decisionmaking. It is not just that there is no solution that pleases a majority of voters; in our case, Laycock, Green, and Minow would fail even to reach any sort of agreement. For each of the three alternatives, there exists another alternative that two voters would prefer. In the language of Arrow's Theorem, it may be that no perfectly democratic solution can be reached with regard to charitable choice. Whether Laycock, Green, and Minow were to represent judges on an appellate panel (or justices on the Supreme Court), groups of legislators, blocks of interest groups, or executive officials, they would not be able to reach a democratic consensus.<sup>80</sup> This is an unsettling conclusion. It is made all the more unsettling because the example is not, as are the examples usually used to illustrate the Theorem, wholly conjectural.

### C. *The Consequences of the Voter's Paradox and Some Concluding Reflections on Locke v. Davey*

The Voter's Paradox phrases its ultimate conclusions in terms of cycling. The real world, however, is not so simple—neither legislatures nor courts are likely to eternally cycle through their options. It is at this point that Arrow's Theorem comes into play, for the Theorem essentially states the costs invariably associated with the prevention of cycling. For if drastic changes are made to the way elections are conducted or to the way voters comport themselves, the risk of cycling can be obviated.<sup>81</sup>

77. Professor Gilman may take this position. See *supra* n. 71.

78. This article cannot point to any commentator that has expressly adopted this position. This should not be taken as an indication that no one adopts this position—commentators and interest groups, unfortunately for purposes of this article, rarely rank their alternative preferences in a neat fashion.

79. See Hovenkamp, *supra* n. 55, at 952 (explaining how “[i]ncreasing the number of possible alternatives or the number of voters only increases the possibility of cycling”).

80. Arrow's Theorem applies to judicial bodies in the same manner as it would apply to legislative or executive ones. For “[l]ike all other multimember decisionmaking bodies, courts are also theoretically subject to the problems of cycling and inconsistency that Arrow's Theorem emphasizes.” Pildes & Anderson, *supra* n. 52, at 2140. See also Easterbrook, *supra* n. 66, at 823-31 (explaining, in detail, why Arrow's Theorem is a particularly likely danger for the Supreme Court).

81. As Arrow would explain it, cycling is a breach of the first condition of rationality. To prevent cycling, another of the five conditions—unanimity, nondictatorship, range, or the independence of irrelevant alternatives—must be suspended.

Of these four conditions, it is difficult to imagine suspending either the unanimity or nondictatorship conditions. As commentators explain, these two principles are so ingrained in democratic theory that it seems virtually impossible to imagine democratic decisionmaking without them. See Block, *supra* n. 51, at 992 (“Of Arrow's axioms, two are difficult to challenge: unanimity and nondictatorship.”). We will therefore consider how the problem could be addressed through a relaxation of the other two conditions—the range and the independence of irrelevant alternatives conditions. As is explained below, suspension of the independence of irrelevant alternatives condition

Arrow's Theorem suggests two possible resolutions. First, it may be that one side in this three-way debate just breaks down. Being risk averse, one side of the debate may be so hostile to its least-preferred choice that it may abandon its ideal preferences to ensure against it. This is known as "strategic voting."<sup>82</sup> In our example, a strong fear of the regulated-funding position may counsel Laycock into accepting the no-funding position. Similarly, a deep aversion of the deregulated-funding position may caution Green into accepting the regulated-funding position. More likely than these two, however, is the third possibility: that Minow will depart from the regulated-funding position to join one of the other two.<sup>83</sup> In the current charitable-choice debate, there has been strong pressure on advocates of the regulated-funding position to move to one of the two other positions.<sup>84</sup> Were they to bend under this pressure, this "strategic action" would prevent cycling.

The second alternative is what is known as "agenda setting." If someone were given the power to take one of the three positions off the table, the Voter's Paradox would instantly dissolve.<sup>85</sup> For a group of voters can always reach a resolution between two choices, no matter how nuanced their preferences. To apply this principle more concretely, note that if our illustrious panel was given only two choices to choose from, it would easily resolve what to do. Pitted against only the no-funding position, the deregulated-funding position would win. Pitted

can happen through "strategic voting," and suspension of the range condition can occur through "agenda setting."

82. See Hovenkamp, *supra* n. 55, at 953 ("[S]trategic' voting [occurs] when a voter refuses to vote her first choice in order to increase the chances of getting her second choice."). In the language of Arrow's Impossibility Theorem, this would be a failure of the independence of irrelevant alternatives criterion, because voters should not be taking into account anything other than their own pure preferences in making their voting decisions. *Id.* at 963 (explaining that "[t]his phenomenon violates Arrow's Independence condition, because it means that a voter will take the preferences of others into consideration in an effort to stop the cycle").

83. This seems the most likely possibility, because the regulated-funding position seems to be the least supported position. See *supra* nn. 69-71 (listing the sponsors of each of the three positions).

84. For example, two of the pieces in the *Harvard Law Review's* symposium on public values were almost explicitly directed at pushing Minow from her position over to the no-funding position. See Saperstein, *supra* n. 16; Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 Harv. L. Rev. 1397 (2003). As noted before, Professor Saperstein's piece was heavily devoted to explaining why regulation of religious institutions was morally and constitutionally problematic. See *supra* n. 76. Dean Sullivan's piece was similarly directed:

Minow depicts in her article a world in which social services may be devolved from government to private providers without too great a loss of public values. She includes religious organizations among the private providers that may participate in joint public-private ventures. . . .

Under prevailing conceptions of freedom of speech, association, and religious practice, however, such public conditions could not be imposed upon religious associations by regulatory fiat. May government use contracts and vouchers to bribe religious entities into a docility and public-mindedness it may not compel through fines and prohibitions? That is the tension at the heart of this Commentary.

Sullivan, *supra*, at 1397.

85. Agenda setting, in the language of Kenneth Arrow, would be a breach of the range condition. Hovenkamp explains the range condition as requiring that "[t]he social choice process must consider all relevant individual preferences, and not just some arbitrarily defined subset. For examples, if possible choices include outcome A, outcome B, and outcome C, the process may not arbitrarily drop outcome C and force a decision between outcome A and outcome B." Hovenkamp, *supra* n. 55, at 950.

against only the deregulated-funding position, the regulated-funding position would win. And pitted against only the regulated-funding position, the no-funding position would win. Majority decisionmaking would yield a consistent outcome and all would, apparently, be well.

The problem with this resolution, however, is that “stability is purchased at the cost of arbitrariness.”<sup>86</sup> The ultimate decision that the panel would make would be entirely dependent on the two choices given to the panel. How the agenda is set would completely determine how the case is resolved. The path-dependent nature of the decisionmaking process smacks of capriciousness.<sup>87</sup>

This last point both illustrates an important point about the constitutional issues in charitable choice generally and returns us to *Davey*. Commentators debating charitable choice, as we have seen, make a variety of constitutional arguments. Indeed, there are serious constitutional arguments against each of the three positions. The no-funding position is argued to be an unconstitutional discrimination against religion.<sup>88</sup> The regulated-funding position is argued to be an unconstitutional condition placed on religious exercise.<sup>89</sup> And the deregulated-funding position is argued to be both an unconstitutional discrimination against secular organizations and an authorization of unconstitutional acts of employment discrimination.<sup>90</sup> Each of these arguments should be seen as a subtle attempt at agenda setting, for each of these constitutional arguments, if adopted by the Court, would effectively take one of the three options off the table.<sup>91</sup>

Consider the advocates of the no-funding position. There has been considerable emphasis by such advocates to push the issue of employment discrimination.<sup>92</sup> They seek to make the deregulated-funding option either politically infeasible or outright unconstitutional. Note that if they were to do

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86. Pildes & Anderson, *supra* n. 52, at 2137.

87. As Pildes and Anderson put it, “[T]o achieve stability, therefore, the political outcomes [will] depend so inherently upon the sequence of decisions, agendas, and institutions, that these outcomes can be characterized as little more than arbitrary.” *Id.* at 2137. See also Hovenkamp, *supra* n. 55, at 951 (noting that “the outcome of the vote will depend entirely on how the agenda is set”).

88. See *supra* n. 44.

89. See *supra* n. 45.

90. See *supra* nn. 46, 48.

91. See David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 Vand. L. Rev. 647, 654 (1997) (noting that because “the order of voting determines the outcome . . . significant power [is vested] in anyone who has the ability to manipulate the order of the voting”).

92. The emphasis on the employment discrimination issue among no-funding proponents is pronounced. As Professor Green notes, “The discrimination issue has so resonated that the coalition of church-state and civil liberties organizations that has fought Charitable Choice since 1995 renamed itself the Coalition to End Religious Discrimination.” *Supra* n. 31, at 8. See also *Coalition Against Religious Discrimination Letter*, *supra* n. 70. Moreover, organizations adopting the no-funding position rhetorically phrase their opposition to charitable choice in terms of opposing religious discrimination. See Americans United for Separation of Church and State, *Oppose the Faith Based Initiative: Tell Your Elected Officials to Oppose Government Funded Religious Discrimination!*, <http://capwiz.com/au/issues/alert/?alertid=519221&type=CO> (accessed Jan. 6, 2005); Baptist Joint Committee on Public Affairs, *Faith-Based Plan Pits Church Autonomy Against Equal Employment Principle*, <http://www.bjcpa.org/Pages/Views/2003/08.03hollman.html> (accessed Jan. 6, 2005) (“Faith-based initiatives raise many concerns, but the prospect of government-funded employment discrimination may be most troubling to the general public.”).

such a thing—if the deregulated funding position were taken off the table—then our Voter's Paradox would collapse into a simple pairwise decision between the regulated-funding position and the no-funding position. Our panel would then quickly decide on the no-funding position. In such a case, the proponents of the no-funding position would have cleverly managed to capture the support of those who are generally in favor of charitable choice, but who are gravely concerned about the regulation of religious institutions.

Now consider *Davey* as a similar attempt at agenda setting. If the Court had ruled in *Davey*'s favor and held that religious institutions must be allowed to participate in generally applicable funding programs, the unmistakable implication would have been that the no-funding position, whether in a voucher context (like *Davey*) or an indirect-funding context (like charitable choice), was unconstitutional. Such a holding would have cut the Gordian knot our panel faces; with the no-funding position eliminated, our panel would have quickly resolved both the funding and regulation questions.

Ultimately, both Congress and the Courts need to be aware of these agenda-setting points. Whatever the ultimate resolution of the constitutional issues surrounding charitable choice (and there are many),<sup>93</sup> the decision that chooses between these three options must not be made in a piecemeal fashion. The Supreme Court particularly must take this into account, given the usually dichotomous nature of its decisionmaking process. It must recognize that its determination on any of the constitutional issues surrounding funding or regulation will have reverberations on the entire debate.

## V. CONCLUSION

For over fifty years, our society has debated whether, and to what extent, religious institutions should receive government funds for the provision of social services. The debate has ranged from bus transportation to school vouchers, and now to charitable choice. Initially, the debate was heated but simple. Its focus was the question: should religious organizations receive government funds?

Now, however, the debate is not so simple. As religious groups have begun to serve as equal providers of social services, the question of how they will be regulated has taken on real importance. Suddenly, an uncomplicated debate over the meaning of the Establishment Clause has exploded into a convoluted three-way debate upon which principles of nonestablishment, free exercise, equal protection, and unconstitutional conditions all bear.

The resulting debate can perhaps best be understood through the lens of Condorcet's Voter's Paradox and Arrow's Impossibility Theorem. Indeed, the charitable-choice debate is a powerful and salient example of these rarely encountered theorems so often utilized by social-choice theory. Not only is it interesting to note their application to charitable choice, but they also illuminate

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93. See Lupu & Tuttle, *supra* n. 32, at 983 ("[C]haritable choice arrangements are thick with constitutional questions . . ."); see also *supra* nn. 44-48.

the inherent risk of cycling in charitable choice and the agenda-setting and strategic-voting attempts that may develop in the wake of that risk. Finally, because charitable choice is such an ideal exemplification of Arrow's Theorem, the charitable-choice debate may have use as a way of understanding how Arrow's Theorem functions in our modern-day political system.